



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

of an expert investigation.¹⁶ By the Connecticut method, the tax on an interstate car company is levied upon that portion of the *gross earnings* which the ratio of miles run by the cars in Connecticut bears to the total interstate *car-mileage*. This is in lieu of all other taxes.¹⁷ This would seem to give a nicer ratio even than car-days; not only in the *base* does going value find consideration, to fix the total taxable assets of the company; but in the ratio—for car mileage obviously bears a close relation to the amount of the going value which is derived from the use of cars in the taxing state.

All of the objectionable features of the other schemes are hereby eliminated, except the difficulty of administration, which could be alleviated by the requirement of adequate statistical information from the companies. Gross earnings are an equitable measure of the total fixed and going value of the "property." And the number of miles traveled in a state would seem to be a fairly accurate indication of the benefits, protection and business derived from the state.

THE LAW DETERMINING THE NATURE OF A TRANSACTION AS CIVIL OR COMMERCIAL

In most of the countries of continental Europe and of Central and South America the law merchant has not been absorbed by the general law of obligations and is codified to-day in commercial codes which exist side by side with civil codes. This fact makes it frequently necessary to distinguish between a *civil* and a *commercial* transaction. The importance of the difference may relate to the jurisdiction of courts or to the substantive law that is applicable. To illustrate: Litigation relating to commercial transactions must be brought in some countries (for example, France) before special courts. Or a contract that is entered into by several parties may impose upon such parties a joint liability if the contract is governed by the provisions of the civil code, and a joint and several liability if it is controlled by the provisions of the commercial code. From the standpoint of the conflict of laws also, one rule may be applicable to a civil obligation and another to a commercial obligation. Where a contract is made in one country and suit is brought upon it in another, the problem may arise therefore which law shall determine the nature of the transaction as civil or commercial.

A decision of the Court of Appeals of Milan of July 1, 1914, suggests that in so far as the question concerns the substantive law that is

¹⁶ Report of the Special Commission on Taxation of Corporations (1913) in accordance with Public Acts of Conn. 1911, ch. 283.

¹⁷ Conn. Rev. St. 1918, sec. 1386. When such taxes are levied in lieu of all other taxes, courts usually sustain them. *Cudahy Packing Co. v. Minnesota* (1918) 246 U. S. 450, 38 Sup. Ct. 373.

applicable it is to be governed by the law of the place where the contract was entered into. *Polar v. Gioia, Foro Italiano*, 1914, I, 1326.

The problem may arise under the following conditions: (1) it may arise in a state in which no distinction is made between civil and commercial transactions; (2) it may be presented in a state in which such a distinction exists only in the internal law, inclusive of the jurisdiction of courts; (3) it may come before the courts of a state whose internal law recognizes such a distinction and whose conflict of laws applies different rules to civil and commercial transactions. In (2) and (3) the question may relate to the jurisdiction of courts or to matters of substantive law.

Whenever the question comes before the courts of a state belonging to class (1) the problem is free from difficulty. A judge of the United States, for example, would simply ascertain the rule governing contracts in the conflict of laws. If the law of the forum prescribes the law of the place of making or the law of the place of performance, the judge will apply the law of contracts¹ of such state. In case the foreign law has two rules of internal law, one of which relates to civil contracts and the other to commercial contracts, the judge would select the rule applicable to the particular case. The law governing the contract would in the nature of things determine also the character of the obligation as civil or commercial.

The answer would be the same, so far as the application of substantive law is concerned, if the problem came before a judge sitting in a state belonging to group (2), for it is obvious that the distinction made by the internal law of the forum between civil and commercial transactions has reference only to transactions within the state. If the law of the forum should require commercial transactions to be brought before special tribunals, it would apply, however, to all cases brought before the courts of the state. The distinction between civil and commercial transactions would affect in this case not the substantive rights of the parties, but only the jurisdiction of the local courts, which is subject to the law of the forum. The courts and writers are practically agreed on this point.²

¹ If the law of the forum sanctions the *renvoi* doctrine it would incorporate the foreign law inclusive of its rules of the conflict of laws. See *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COLUMBIA L. REV. 190-207; 327-344; *The Renvoi Doctrine in the Conflict of Laws* (1918) 27 YALE LAW JOURNAL, 509-534.

² Cavaglieri, *La distinzione fra atti civili e commerciali e la legge che la determina*. (1910) 29 Il diritto commerciale, 35-36; Fedozzi, *Il diritto processuale civile internazionale*, 328, 526, ff.; Grasso, *Principii di Diritto internazionale pubblico e privato*, 279; 1 Lyon-Caen & Renault, *Traité de droit commercial* (4th ed.) no. 183.

One or two authors would apply the law governing the substance of the act. 2 Calvo, *De droit international* (5th ed.) 394; 1 Diena, *Trattato di diritto commerciale*, 72-73.

The problem becomes more difficult in a state whose law determines civil and commercial obligations by different rules in its system of the conflict of laws. Suppose, for example, that "capacity" to contract is governed by the national law of the parties as regards civil contracts and by the law of the place of contracting as regards commercial contracts.³ The Court of Appeals of Milan argued that inasmuch as the character of the obligation as civil or commercial concerns the substance of the obligation and the substance and effect of obligations are subject to the *lex loci contractus*, the latter law should be controlling to determine whether a given transaction falls within the one or the other category. Most of the authors appear to approve this view.⁴ Others are of the opinion that the question should be decided in accordance with the test laid down by the law of the forum. Two theories have been advanced in support of the view last mentioned. One is that of Lyon-Caen & Renault⁵ who regard the distinction between civil and commercial acts as closely connected with the public policy of the forum. It is difficult to see, however, in what respects the adoption or incorporation on the part of the law of the forum of the distinction made by the *lex loci contractus* would be contrary to "pure morals, or abstract justice" or "would be of evil example, and harmful to its own people, and therefore inconsistent with the dignity of the government whose authority is invoked,"⁶ or would violate in other respects paramount interests of the forum. The distinction does not rest upon any considerations of policy so vital to the forum that the latter must decline on that ground to incorporate the foreign law. This is admitted by most of the foreign writers.⁷ Some of them favor nevertheless the application of the law of the forum on the ground that the

³ This is the situation in Italy where the parties have different nationalities. Article 6 of the Preliminary Dispositions of the Civil Code provides that the capacity of persons shall be regulated by the law of the state to which they are subject. As regards commercial contracts, Article 58 of the Commercial Code governs, which provides that "the form and the essential requisites of commercial obligations . . . are governed, respectively, by the laws and usages of the place where the obligations are created." The term "essential" requisites is understood to include "capacity." Anzilotti, *Rivista di diritto internazionale*, 1914, p. 611; 1 Diena, *op. cit.*, 138; 1 Vivante, *Trattato di diritto commerciale*, no. 21.

⁴ Asser & Rivier, *Éléments de droit international privé*, no. 92; 2 Calvo, *op. cit.*, 394; Grasso, *op. cit.*, 279 ff.; Olivi, *Manuale di diritto internazionale pubblico e privato*, 803; Surville & Arthuys, *Traité de droit international privé* (6th ed.) no. 446. Cf. also 1 Diena, *op. cit.*, 67 ff.; Diena, *Sulle legge che determina il carattere civile o commerciale degli atti giuridici*, 35 *Rivista Italiana per le scienze giuridiche*, 361.

⁵ 1 Lyon-Caen & Renault, *op. cit.*, no. 183.

⁶ Stafford, J., in *Morrisette v. Canadian Pacific Ry.* (1904) 76 Vt. 267, 56 Atl. 1102.

⁷ Cavaglieri, *op. cit.*, 39; 1 Diena, 61.

question concerns the *qualification* of a legal transaction.⁸ These authors accept the view first propounded by Bartin,⁹ now professor at the *Ecole de Droit* of Paris, which is known as the "theory of qualifications." Although the problem in the conflict of laws thus raised has given rise to a great deal of discussion, no agreement has been reached with regard to it. Indeed the very nature of the problem remains yet to be clearly defined. The discussion embraces a large number of what, for want of a better term, may be called "preliminary questions" in the conflict of laws. The following are some of the principal instances. Shall the internal law of the forum or some "foreign" law be applied in the conflict of laws in determining (1) what the nationality or domicile of a party is; (2) whether given property is movable or immovable; (3) which of different jurisdictions is the *lex loci contractus* in the case of a contract made by correspondence; (4) whether a given act is "civil" or "commercial"; (5) whether the rights of the surviving widow fall under the law of husband and wife or under the law of inheritance; (6) whether a particular transaction involves (a) a question of "substance" or of "procedure," (b) a question of "capacity" or of "form?"

A discussion of Bartin's theory and the various objections that have been raised thereto cannot be undertaken in this place, nor can all of the preliminary questions above mentioned be adequately dealt with here. As regards civil and commercial transactions it is quite apparent that the internal law of the forum must control. In the absence of international conventions on the subject each country must determine all questions in the conflict of laws in accordance with its own sense of justice and convenience. All rights and duties are upon strict analysis created by the law of the forum.¹⁰ Where some of the operative facts are in another state or country the conflict of laws of the forum *may* annex the same consequences to the acts as are attached thereto by the internal law of the state where the acts occurred. Whether it *will* do so or not does not depend upon the will of the foreign state but upon the forum's own sense of right.

In the case under discussion the Italian rule of the conflict of laws prescribed that the capacity of the parties should be governed, as regards civil contracts, by the law of the state to which such parties

⁸ Cavaglieri, *op. cit.*, 50; Anzilotti, *Rivista di diritto internazionale*, 1914, p. 614; Anzilotti, *Il principio dell' autonomia dei contraenti nei rapporti fra l'art 9, delle disposizioni preliminari al Cod. Civ. e l'art 58 di Cod. di commercio*, 22 *Diritto commerciale*, 30.

⁹ Bartin, *De l'impossibilité d'arriver à la suppression définitive des conflits de lois* (1897) 24 *Clunet*, 225, 466, 720. Reprint in *Etudes de droit international privé*, I ff., under title "*La théorie des qualifications en droit international privé*."

¹⁰ See, to this effect, Hohfeld (1909) 9 *COLUMBIA L. REV.* 496, 520, 522, note; Cook (1918) 28 *YALE LAW JOURNAL*, 67-71.

belonged by nationality; and as regards commercial contracts, by the *lex loci contractus*. By the "national law" or "the law of the place of contracting" the Italian law understands the internal law of the foreign state to the exclusion of its rules of the conflict of laws.¹¹ In other words, it selects the rule of law that shall govern the case, relying solely upon its own judgment, without reference to the views entertained by the foreign legislator. In so doing it takes an attitude which is sound from the standpoint of theory and which is in conformity with the requirements of practical convenience.¹² If this is the interpretation of the Italian rules of the conflict of laws it would seem to follow *a fortiori* that in the determination of the preliminary question upon which the application of the foreign law depends,—whether the transaction is civil or commercial—the Italian legislator must have had reference to the distinction made by his own law.

E. G. L.

ACQUISITION OF DOMICIL IN EXTRATERRITORIAL COUNTRIES

After great and protracted difficulty in finding either legal or factual justification for the doctrine, the English courts in the case of *Casdagli v. Casdagli* (1919, H. L.) 120 L. T. Rep. 52, have finally come to the conclusion that an Englishman can establish a domicile in a country granting extraterritorial rights to foreigners. The case is doubly interesting in that it brings the English law on the point into harmony with conclusions reached some time since in the American courts, and in that the development of the doctrine shows strikingly the influence which the jurists sometimes exert on the decision of cases in the courts.

This so-called "extraterritorial domicile" first came up for discussion in *Maltass v. Maltass*,¹ where Dr. Lushington, relying on the famous case of *The Indian Chief*,² expressed the opinion that "every presumption was against the intention of a British Christian voluntarily becoming domiciled in the dominions of the Porte," because of the "total and entire difference of religion, customs and habits." But the decision there went off on the ground that under treaty provisions an Englishman's will made in Turkey might be good. The question

¹¹ Cass. Rome, Jan. 1906, and App. Rome, Dec. 1 (1906), 34 Clunet, 1205.

¹² (1910) 10 COLUMBIA L. REV. 197 ff., 205 ff.; (1918) 27 YALE LAW JOURNAL, 511 ff., 524 ff.

¹ (1844) 1 Rob. Eccl. 67.

² (1800, Eng. Adm.) 3 C. Rob. 12. Lord Stowell's language was: "In the western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted; and they become incorporated to almost the fullest extent; in the East, from the old times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were."